314 U.S. 63
(3)

Office - Supreme Court, U.S.
FILED
JUN 6 1941
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 135

ESTATE OF A. M. WILDER, DECEASED, JOSEPHINE U. WILDER, EXECUTRIX,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

W. W. SPALDING,
Counsel for Petitioner.

INDEX.

Subject Index.

	Page
Petition for writ of certiorari	1
Jurisdiction	2
Question presented	2
Summary of matters involved	2
Reasons relied on for allowance of the writ	7
Brief in support of petition	11
Opinion of the court below	11
Jurisdiction	12
Statement of the case	12
Specification of error	12
Statutes involved	12
Argument	13
No liability for estate taxes may be based upon the annuity contracts, because at the death of the decedent nothing passed from the dead to the living. The contracts in question are not within the scope of H-J Resolution 529, March 3, 1931	13
As the decedent did not possess at the time of his death any of the incidents of ownership of the annuity contracts, they are not includable in computing his taxable estate for estate tax purposes	21

Table of Cases Cited.

Ballard v. *Helburn*, 9 Fed. Supp. 812; affd. 85 F. (2d) 613	23
Bingham v. *United States*, 296 U. S. 211	23
Charles F. Clise v. *Commissioner*, 41 B. T. A. 820	8, 17, 18
Chemical Bank & Trust Co. v. *Commissioner*, 37 B. T. A. 535	16
Commissioner of Internal Revenue v. *Sharp*, 91 F. (2d) 804	21
James Uriah Blacksher, 38 B. T. A. 998	22
McElvey v. *Commissioner*, 82 F. (2d) 395	21
William D. Boswell, Estate of, 37 B. T. A. 970	21

Statutes Cited.

Judicial Code, Sec. 240	12
Revenue Act of 1926, c. 27, 44 Stat. 9, as amended by H-J Res. 529 of March 3, 1931, c. 454, 46 Stat. 1516	12
Revenue Act of 1926, Sec. 302(g)	21

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 135

ESTATE OF A. M. WILDER, DECEASED, JOSEPHINE U. WILDER, EXECUTRIX,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE.

Respondent.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable the Chief Justice and Associated Justices of the Supreme Court of the United States:

The petitioner, Estate of A. M. Wilder, Deceased, Josephine U. Wilder, Executrix of said estate, now presents this, its petition for a writ of certiorari to review the decree of the Circuit Court of Appeals for the Fifth Circuit, which reversed the decision of the Board of Tax Appeals in the proceeding of this petitioner against the Commissioner of Internal Revenue. The opinion of the Circuit Court of Appeals for the Fifth Circuit in this case is reported in 118 F. (2d) 281. It appears at pages 51 to 54 of the Record.

This proceeding involves the alleged liability of petitioner

for additional Federal estate taxes asserted against it by the Commissioner of Internal Revenue.

Accompanying this petition is a certified transcript of the record below, consisting of pleadings, findings of fact and decision of the Board of Tax Appeals, statement of evidence, together with the proceedings and opinion of the Circuit Court of Appeals.

Jurisdiction.

(a) The jurisdiction of this Court under Section 240 of the Judicial Code as amended is invoked. The decision sought to be reviewed is that of a Circuit Court of Appeals.

(b) The date of the decree of the Circuit Court of Appeals sought to be reviewed is March 20, 1941 (R. 55). The petition for certiorari was filed in this Court on June 6th, 1941.

(c) This is an action originating in the United States Board of Tax Appeals, involving the power of the Commissioner of Internal Revenue to assess and collect additional estate taxes from this petitioner.

Question Presented.

The question involved in this case is this: Should there be included in the taxable estate of the decedent, for estate tax purposes, one-half of the value of certain annuity contracts purchased by the decedent from an insurance company with funds of the community, the decedent receiving the annuity for his life and the surviving spouse for her life?

Summary of Matters Involved.

The decedent is the late A. M. Wilder, who died a citizen and resident of Shreveport, Louisiana, on May 19, 1937. The petitioner, Josephine U. Wilder, is the executrix of his estate.

On July 5, 1934, December 5, 1934, December 5, 1934, and March 12, 1936, decedent purchased from the New York Life Insurance Company of New York four annuity contracts of the type known as joint and survivor annuity policies. These contracts provide for the monthly payment by the Insurance Company of $500 for the four contracts. These monthly payments were to be made to the decedent during his life, and thereafter to his widow, Josephine U. Wilder.

This case was tried at the Board of Tax Appeals principally upon a stipulation of facts. It is recited in the stipulation that each of the contracts just mentioned was paid for out of community funds of decedent and wife.

A copy of each contract is made part of the stipulation. Each of them is substantially the same, and one of them, only, will be copied into this petition. It follows:

"NEW YORK LIFE
INSURANCE COMPANY

A MUTUAL COMPANY
AGREES TO PAY

TO *A. MACK WILDER during his life time and upon his death to* ~~and~~ *JOSEPHINE U. WILDER, if she be living,* the Annuitants, ~~jointly and after the first death to the survivor of them during the lifetime of such survivor,~~

"AN ANNUITY OF * * * *TWELVE HUNDRED* * * * Dollars payable in equal *Monthly* payments of * * * *ONE HUNDRED* * * * Dollars each; the first payment to be made on the *First* day of *August* Nineteen Hundred and *thirty-four* if either of the Annuitants is then living, and subsequent payments on the *First* day of *Each Month* in every year thereafter, said Annuity terminating with the last *Monthly* payment preceding the death of the last surviving Annuitant. No proportionate annuity payment will be made to the day of death of the last surviving Annuitant.

"If annuity payments are to be made to any one other than the Annuitants, or if the Company's check for any annuity payment is not to be endorsed personally by the Annuitants, the Company reserves the right to require satisfactory evidence that both or that the survivor of the said Annuitants is living on the date of the annuity payment falls due.

"This Annuity is granted upon the declaration that the Annuitants were born on the *Sixth* day of *August,* One Thousand *eight hundred seventy-eight* and on the *Tenth* day of *January,* One Thousand *eight hundred eighty-seven* respectively, and if such declaration shall be found incorrect then the amount of Annuity payable under this contract shall be such as the single premium paid would have purchased at the correct ages. Any overpayment or overpayments by the Company, with interest thereon at the rate of six per cent (6%) per annum, shall be charged against the payments to be made after adjustment.

"This policy constitutes the entire contract between the parties and does not participate in the surplus of the Company.

"All benefits under this contract are payable at the Home Office of the Company in the City and State of New York.

"No agent is authorized to make or to modify this contract.

"The reserve held by the company for this Annuity Contract shall be calculated on the Combined Annuity Tables, with interest at 4%.

"This contract is made in consideration of the payment in advance of the single premium of * * * *TWENTY-TWO THOUSAND FOUR HUNDRED FOURTEEN* 30/100 * * * Dollars to be made only by bank draft or certified check to the order of New York Life Insurance Company, in exchange for its official premium receipt signed by the President, a Vice-President, a Second Vice-President, a Third Vice-President, a Secretary or the Treasurer of the Com-

pany and counter-signed by the Cashier of its Branch Office.

"IN WITNESS WHEREOF the NEW YORK LIFE INSURANCE COMPANY has caused this contract to be signed this *Fifth* day of *July* Nineteen Hundred and *thirty-four*.

"Eighteen words struck out before signing.

(S.) THOMAS A. BUCKNER,
President.

(S.) FREDERICK M. JOHNSON,
Secretary.

Adapted.

J. & S. A.-S. P.
930-264.
Ages: {55¾ / 47¼}
Examined

_____MR.
MM.

_____,
Registrar."

On the back of the contract, the following appears:

"*NEW YORK*
LIFE
INSURANCE
COMPANY

Home Office:
51 Madison Avenue, Madison Square
New York, N. Y.

No. 51431

Joint and Survivor

ANNUITY POLICY

on the lives of

A. MACK WILDER

and

JOSEPHINE U. WILDER

Ages { 55¾ years
47¼ years

Monthly Annuity Payments of
$100.00 *each*
Single Premiums $22414.30.

SHREVEPORT Branch

Joint and Survivor Annuity. Single Premium.
Non-participating. 930-264 Adapted.
L. "

Respondent determined the value of the four contracts at the date of decedent's death to be $104,356.24, and included one-half of that amount in the taxable estate.

By the witness, Luther M. Byrd, the petitioner put in evidence these facts:

Witness has been connected with the New York Life Insurance Company of New York, the company that issued

the annuity contracts, for thirteen years, and is now Agency Director of that company at New Orleans. The four annuity contracts involved in this case are irrevocable. No right to change the beneficiaries was reserved. The contracts in question had no cash surrender value and no loan value. In fact, none of the indicia of ownership usually to be found in life insurance policies is to be found in the contracts in the present case.

From an adverse ruling by respondent of the question involved, petitioner prosecuted an appeal to the Board of Tax Appeals where the ruling of respondent was reversed. The Board of Tax Appeals held that no part of the value of the annuity contracts at the date of the death of the decedent should be included in his taxable estate for estate tax purposes. From this decision an appeal was prosecuted by respondent to the Circuit Court of Appeals for the Fifth Circuit. On March 20, 1941, the Circuit Court of Appeals rendered its decision reversing the Board of Tax Appeals and holding that the estate of the decedent was liable to estate taxes on one-half of the value of the annuity contracts at the date of the death of the decedent.

Reasons Relied On for Allowance of the Writ.

The reasons relied on for the allowance of the writ in this case are two-fold, viz.:

(a) The decision of the Circuit Court of Appeals is erroneous. It reverses the established rule at the Board of Tax Appeals in cases of this sort. In not less than three cases the Board of Tax Appeals has expressly held that annuity contracts such as we have here are not a part of the estate of the decedent, for estate tax purposes. The decision sought to be reviewed involves important questions of Federal law which should be settled by an authoritative decision of this Court. It involves questions of general

interest affecting not alone the estate tax liability of petitioner but also that of many others. It decides a Federal question in a way in conflict with the principle of applicable decisions of this Court. These questions are discussed in the accompanying brief for petitioner.

(b) Two cases involving the identical question with which we are concerned here were before the Board of Tax Appeals at the same time, the second case being that of *Charles F. Clise et al.* v. *Commissioner of Internal Revenue.* The *Clise* case was decided first, the decision appearing in 41 B. T. A. 820. It held that an annuity contract was not within the statute taxing the estates of decedents for estate tax purposes. From that decision an appeal was prosecuted by respondent to the Circuit Court of Appeals for the Ninth Circuit, where that case is now pending, undecided. The same decision was made by the Board of Tax Appeals in the instant case.

If the Circuit Court of Appeals for the Ninth Circuit should affirm the decision of the Board of Tax Appeals of this question, we would have the situation of two Circuits deciding an identical question differently—one in favor of the taxability of the annuity contracts for estate tax purposes and the other contrary to such taxability. If that condition should exist, petitioner would be clearly entitled to the writ herein asked for. This being true, petitioner respectfully requests that no action be taken on this application until the decision of the Circuit Court of Appeals for the Ninth Circuit in the *Clise* case shall have been rendered. Petitioner assumes that if the decision of the Ninth Circuit should affirm the Board of Tax Appeals on the question here involved, on that ground alone a writ of certiorari will be issued in the present case. If, however, that decision, also, should be adverse to the taxpayer, there will remain the question of whether petitioner

is entitled to the allowance of the writ herein sought, on the ground that the decision sought to be reviewed involves important questions of Federal law which should be settled by an authoritative decision of this Court. It may be added that the present case involves questions of general interest affecting not alone the estate tax liability of petitioner but that of many other taxpayers as well.

The premises considered, petitioner respectfully asks for the issuance of a writ of certiorari to review the decree of the Circuit Court of Appeals for the Fifth Circuit in this petitioner's case, and for the entry of such orders as may be incidental to that relief.

W. W. SPALDING,
Tower Building,
Washington, D. C.,
Counsel for Petitioner.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 135

ESTATE OF A. M. WILDER, DECEASED, JOSEPHINE U. WILDER, EXECUTRIX,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE.

BRIEF FOR PETITIONER ON PETITION FOR WRIT OF CERTIORARI.

MAY IT PLEASE THE COURT:

We take the liberty of making the following suggestions in support of the petition for writ of certiorari in the present case:

Opinion of the Court Below.

The opinion of the court below was rendered on March 20, 1941, by the Circuit Court of Appeals for the Fifth Circuit on the appeal of respondent to that court. The opinion of the court may be found in 118 F. (2d) 281. It appears at pages 51 to 54 of the Record.

Jurisdiction.

The jurisdiction of this Court in the present case is stated in the accompanying petition for certiorari.

Statement of the Case.

We adopt as a statement of the present case the summary of matters involved and reasons relied on for the issuance of the writ of certiorari appearing in the accompanying petition for writ of certiorari.

Specification of Error.

The lower court erred in holding that there should be included in the taxable estate of the decedent, for estate tax purposes, one-half of the value of the annuity contracts purchased by the decedent from an insurance company with funds of the community, the decedent receiving the annuity for his life and the surviving spouse for her life.

Statutes Involved.

The statutes involved are the Revenue Act of 1926, c. 27, 44 Stat. 9, as amended by H-J Resolution 529 of March 3, 1931, c. 454, 46 Stat. 1516, as follows:

> "Sec. 302. The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real, or personal, tangible or intangible, wherever situated——
>
> * * * * * * *
>
> "(c) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, including a transfer under which the transferor has retained for his life or any period not ending before

his death (1) the possession or enjoyment of, or the income from, the property or (2) the right to designate the persons who shall possess or enjoy the property or the income therefrom; except in case of a bona fide sale for an adequate and full consideration in money or money's worth. * * *"

ARGUMENT.

It is now respectfully urged:

No liability for estate taxes may be based upon the annuity contracts, because at the death of the decedent nothing passed from the dead to the living. The contracts in question are not within the scope of H-J Resolution 529, March 3, 1931.

As the decedent did not possess at the time of his death any of the incidents of ownership of the annuity contracts, they are not includable in computing his taxable estate for estate tax purposes.

These, in the order in which they have been stated:

No liability for estate taxes may be based upon the annuity contracts, because at the death of the decedent nothing passed from the dead to the living. The contracts in question are not within the scope of H-J Resolution 529, March 3, 1931.

The relation of husband and wife in community property States has been likened to that of equal partners. The cost of the annuity contracts under consideration was paid for wholly out of community property of the decedent and his wife, Josephine U. Wilder. (Stipulation of Facts, R. 30-31.) The community property of the decedent and his wife was thus *invested* by the managing partner in these contracts. Each spouse owned a one-half interest in the contracts (under the laws of the State of Louisiana) that were so purchased with community funds.

The Circuit Court of Appeals ruled that one-half of the value of the contracts at the date of the decedent's death should be included in the taxable estate. Which one-half? Manifestly, the one-half share that belonged to the decedent, because the share of the widow was acquired at the time when the original investment in the contracts was made. The tax, then, is to be laid not upon the share of the surviving wife, but rather upon the share of the decedent. Is this justified?

In 1934-1936, the decedent purchased a life estate in the contracts in question, i.e., the right to receive the annuities during his life. He paid for this investment with funds of the community. He actually got everything that he bargained for, viz., a definite amount of money payable to him monthly so long as he should live. It was not within the contemplation of the parties to the annuity contracts that the decedent should have the right to dispose of his investment by will or to pass it under the laws of descent and distribution to his heirs-at-law; nor did he have the right to name a beneficiary of his share. On the contrary, all his rights ceased with his death. As we have said, he had nothing more or less than a life estate in the contracts.

The rights of Josephine U. Wilder, wife of the decedent, were exactly the same under the contracts as those of the decedent himself, except that the annuity payable to her was to commence in the future, viz., after the death of the decedent. There can be no question but that the decedent purchased the contracts for the *immediate* benefit of himself and wife. Mrs. Wilder is receiving at the present time the annuities under and by virtue of the contracts made in 1934-1936. Her right to the annuities exists solely by reason of the contracts. Those rights vested in her immediately upon the execution of the contracts in 1934-1936. Specifically, those rights did not come to her by reason of the death of the decedent.

The consideration passing from the decedent to the New York Life Insurance Company for the annuity contracts was his share of the community funds paid for the contracts. If we consider singly the case of any annuitant, there is an element of speculation in the issuance of an annuity contract. For how long or how short a period of time will the annuitant live? Upon the answer to this question depends the profit or loss of the annuity writer in the particular transaction; but whether it be a profit or a loss, the cost of the contract to the annuitant is in fact exhausted over the period the contract actually runs. So, in the present case, the decedent's one-half share of the community funds invested in the contracts was exhausted while the contracts were running, leaving no part of the decedent's interest in the contracts to pass to his heirs-at-law or legatees. The asset was exhausted during the life of the decedent, and nothing passed from the dead to the living when he died.

The case here is on all fours with that of a life estate in realty. It will be conceded that where a life estate exists in realty, as a result of an investment of funds of two individuals, one of whom is to take the property for life, the other the remainder, nothing should be included in the taxable estate of the life tenant for estate tax purposes. Why? Because nothing passes from the dead to the living at that time. The rights of the remainderman do not come to him by reason of the death of the life tenant, but rather by virtue of his original investment made at the time of the acquisition of the property.

So, in the present case, the decedent's widow does not get the annuity from the share in the community contracts that was owned by the decedent during his life, because his rights under such contracts—a life estate—terminated with his death. Rather is such income received by her by virtue

of the investment of *her* one-half of the community property paid for the contracts. *We thus have a case where it appears that all property rights that persist after the decedent's death arise out of an investment of the survivor's own funds made years before his death by the decedent for her.*

The principle for which we contend here has been recognized even in common law States by the Board of Tax Appeals. In the case of *Chemical Bank & Trust Company* v. *Commissioner of Internal Revenue*, 37 B. T. A. 535, the Board had before it the same question we have here, viz.: Were certain joint and survivor annuity contracts includable in the taxable estate of the decedent for estate tax purposes? The Board held that they were not so includable.

The annuity contracts in the *Chemical Bank* case appear to be identical with those in the present case. In disposing of the question before it, the Board said:

> "We shall take up and dispose of the issues in the order that we have stated them. Issue (1) relates to two annuity contracts which decedent had purchased in his lifetime from the Mutual Life Insurance Co. of New York for lump sum payments. These annuities were payable to decedent as long as he should live, and at his death if his wife survived him the annuities were payable to her as long as she should live. Decedent's wife did survive him, and respondent included in decedent's gross estate the amount which he determined to be the value, at the date of decedent's death, of the annuities which were payable to her. The annuity contracts when purchased were irrevocable. The decedent had no right to change the beneficiary and no control or interest in the contracts other than his right to receive the annuities during his life. This right ceased at his death. The interest which his wife, Mary L. Saxe, had was a right to receive the annuities after his death if she survived him. *That right she obtained absolutely at the time*

the contracts were made. It was not a right over which the testator had any power of revocation or control during his lifetime, and at his death nothing passed from the dead to the living. May *v.* Heiner, 281 U. S. 238; Burnet *v.* Northern Trust Co., 283 U. S. 782; Morsman *v.* Burnet, 283 U. S. 783; McCormick *v.* Burnet, 283 U. S. 784.

"These annuity contracts are different from the ones which we had before us in Guaranty Trust Company of New York, Executor, 16 B. T. A. 314. In that case the annuity contracts were revocable at the pleasure of Mrs. Roxy M. Smith, who purchased them. In our opinion in that case we point out this fact in the following language:

"' * * * The contracts had at all times a cash surrender or commuted value and the decedent could have canceled them at any time and received the amount thereof, and she could have changed the beneficiary and made it payable to whom she pleased.'

In other words, the annuity contracts were essentially equivalent to revocable trusts.

"The situation is different in the instant case. Here the annuity contracts had no cash surrender value and decedent had no power to revoke them. They were in all essential respects equivalent to irrevocable trusts and the Supreme Court decisions relating to conveyances to irrevocable trusts which we have cited above are applicable.

"We sustain petitioner's assignment of error as to issue (1)." (Italics ours.)

So, in the present case, the rights of the wife, Josephine U. Wilder, were obtained by her absolutely at the time the contracts were made. Here, as there, this was not a right over which the decedent had any power of revocation or control during his lifetime and, here as there, nothing passed from the dead to the living.

The present case was decided by the Board of Tax Appeals on authority of the case of *Charles F. Clise et al.* v.

Commissioner of Internal Revenue, 41 B. T. A. 820. That case involved the identical question with which we have to deal here. The Board of Tax Appeals said:

> "The Commissioner relies upon Internal Revenue Code, section 811 (c), which is the result of the amendment by the Joint Resolution of March 3, 1931, which in turn was adopted to restrict the practical effect of May *v.* Heiner, 281 U. S. 238, and Burnet *v.* Northern Trust Co., 283 U. S. 782, McCormick *v.* Burnet, 283 U. S. 784, and Morsman *v.* Burnet, 283 U. S. 783. See Hasset *v.* Welch, 303 U. S. 303. He regards Chemical Bank & Trust Co. et al., Executors, 37 B. T. A. 535, Commissioner's petition for review dismissed, C. C. A. 2d Cir., Jan. 3, 1939, as inapplicable because the annuity contract there considered was made before March 3, 1931, and hence protected from the retroactive application of the amended statute. Hasset *v.* Welch, supra.
>
> "Annuity contracts such as these have never been brought by statute within the gross estate. Seymour Johnson et al., Executors, 10 B. T. A. 411. May *v.* Heiner, supra, did not consider them directly or indirectly, and the remedial resolution of March 3, 1931, did not purport to deal with them.
>
> "By contracting for an annuity in consideration for a single sum the decedent was not transferring property (even though the term property be used to include money, cf. Halliburton *v.* Commissioner, 78 Fed. (2d) 265, C. C. A., 9th Cir.), of which she was retaining the possession or enjoyment of the income. She was purchasing an annuity for herself and her survivor. The property (money) which she was 'transferring' was irretrievably gone and for it she was getting a promise of an annuity, payment of which was not limited or related to income from the consideration which she paid, but was to be made at all events. It may not be regarded as income. Helvering *v.* Butterworth, 290 U. S. 365; Helvering *v.* Pardee, 290 U. S. 365; Ronald De Reuter, 7 B. T. A. 600, 607; affd., Burnet *v.* Whitehouse, 283 U. S. 148. Thus the language

of the statute either before or after the amendment, does not touch it. *It is still true under May v. Heiner, supra, that the rights of decedent's survivors are not to be regarded as attributable to the death, but to a contract made during life, and decedent did not retain for herself the possession or enjoyment of the property transferred or the income from it.*" (Italics ours.)

It was argued in the court below that Section 302 (c) of the Revenue Act of 1926 as amended established a new rule effective as to contracts made after March 3, 1931. That section as amended includes within the taxable estates of decedents, for estate tax purposes, the following described property:

> "To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, or of which he has at any time made a transfer, by trust or otherwise, under which he has retained for his life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death (1) the possession or enjoyment of, or the right to the income from, the property, or (2) the right, either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income therefrom; except in case of a bona fide sale for an adequate and full consideration in money or money's worth."

Taking up the language of the section: It is not true the decedent "made a transfer, by trust or otherwise" of any property to obtain the annuity contracts, as the word "transfer" is used in this and other sections of the Act. The class of cases sought to be reached by the resolution comprises all those where it appears that the decedent made a gift or created a trust and retained for himself the income of the property for his life. But that class of cases has no

kinship with cases such as we have here. Here, there was a community partnership in which the managing partner made an *investment* of partnership funds in certain annuity contracts. For his one-half share of such funds, the managing partner purchased a definite income, which terminated with his death. In recognition of his partner's rights, he also purchased for her the same annuity as he was to have during his lifetime. There was thus, in the present case, no *transfer* within the meaning of the Resolution.

The investment of the community funds in the annuity contracts, i.e., the purchase of annuities with community funds, cannot be regarded as a *transfer,* because, had Congress intended to include transactions of this sort within the scope of the section, it could easily have said so. Instead, Congress inserted in the section an excepting clause which has a direct bearing on the present case, viz.: "Except in case of a bona fide sale for adequate and full consideration in money or money's worth." Congress thus took out of the scope of the Resolution such transactions as that involved in the present case.

The decedent actually *purchased* the contracts from the New York Life Insurance Company. Therefore, that company actually *sold* him those contracts, and no question has been raised as to the bona fides of the sale. That he received an adequate and full consideration in money or money's worth, will be apparent when we consider that with the community funds the decedent purchased annuities for his life and the life of his surviving spouse. Whether the contracts will prove profitable to the Insurance Company will depend upon the length of Mrs. Wilder's life.

As the decedent did not possess at the time of his death any of the incidents of ownership of the annuity contracts, they are not includable in computing his taxable estate for estate tax purposes.

This contention is based upon the analogy of the annuity contracts here involved to life insurance policies. The statute, Section 302 (g) of the Revenue Act of 1926, 44 Stats., as amended, provides for the inclusion in the gross estate of life insurance, as follows:

> "(g) To the extent of the amount receivable by the executor as insurance under policies taken out by the decedent upon his own life; and to the extent of the excess over $40,000 of the amount receivable by all other beneficiaries as insurance under policies taken out by the decedent upon his own life."

It is now well settled that where the insured does not possess the usual rights of ownership of a policy of life insurance at the time of his death, no amount is to be included in the taxable estate on account of such insurance. *McElvey* v. *Commissioner of Internal Revenue*, 82 F. (2d) 395; *Commissioner of Internal Revenue* v. *Sharp*, 91 F. (2d) 804. At the time of his death, the decedent in the present case possessed none of the rights of owership in the annuity contracts, such as the right to change the beneficiary, the right to borrow on the policies, or the right to return them to the company for their cash surrender value.

In the case of the *Estate of William D. Boswell*, 37 B. T. A. 970, which was a life insurance case, the Board of Tax Appeals said:

> "The supposed justification for including the proceeds of the two insurance policies in gross estate is, according to respondent's brief, that decedent possessed 'attributes of ownership' consisting of the right to change beneficiaries, to obtain the surrender value,

and to borrow upon the security, of the policies. In each of these respects we think the conclusion must be otherwise.

"Whether or not the proceeds of these policies are to be included in the gross estate depends, regardless of the time or terms of their issuance, upon whether decedent had any interest in them at the time of his death. David A. Reed et al., Executors, 24 B. T. A. 166; Estate of John T. H. Mitchell, 27 B. T. A. 1; Chase National Bank *v.* United States, 278 U. S. 327. * * *.

"After his final designation of beneficiaries, decedent had, throughout the remainder of his life, no further power in that respect. His authority to alter the designation so made was explicitly limited 'during the lifetime of Annie M. Boswell and Helen R. Boswell (the wife and daughter), or either of them' by the requirement that 'such right is not to be exercised without their written consent'. This provision was tantamount to a surrender of control during the lifetime of decedent's wife and daughter, they being beneficiaries under the policies. David A. Reed et al., Executors, supra; Reinecke *v.* Northern Trust Co., 278 U. S. 339. Since both survived him, decedent had no such power at the time of his death. 'The decedent's death merely terminated the possible contingency of the beneficiary predeceasing the insured'. Estate of John T. H. Mitchell, supra."

The case of the *Estate of James Uriah Blacksher*, 38 B. T. A. 998, is directly in point here. We quote from the syllabus of the opinion in that case:

"1. The proceeds of life insurance policies which provided for payment to the beneficiaries after decedent's death of annuities for a period of 20 years certain and as long thereafter as the beneficiaries should live, the decedent at the time of his death having no right to change the beneficiaries, to receive the cash surrender value of the policies, or to borrow money on the policies without the consent of the beneficiaries, *held* not includable in decedent's gross estate for estate tax purposes."

We find upon reading the opinion in the cited case that the present case and the cited case are alike in several respects, among which are these:

In each case the policy was procured by and issued to the decedent by the insurance company.

In each case the decedent did not retain or possess the right to change the beneficiary.

In each case the decedent did not have the right to borrow on the policy or to surrender the policy for its cash surrender value.

In each case the right of the survivor in interest was to an annuity beginning at the death of the decedent.

In the opinion in the cited case, the Board of Tax Appeals cites and quotes from a decision of the Supreme Court in *Bingham* v. *United States,* 296 U. S. 211, and from *Ballard* v. *Helburn,* 9 Fed. Supp. 812; affirmed, 85 F. (2d) 613, as follows:

> "In Bingham *v.* United States, 296 U. S. 211, which involved the question whether the proceeds of certain life insurance policies, under facts similar to those in the instant proceeding, should be included in the gross estate, the Court said:
>
> "' * * * The decedent had no power, none being reserved, to change the beneficiaries, to pledge or assign the policies after the assignment to his wife, or revoke that assignment or surrender the policies without the consent of the beneficiaries. Central Bank of Washington *v.* Hume, 128 U. S. 195, 205, 9 S. Ct. 41, 32 L. Ed. 370; Miles *v.* Connecticut Life Ins. Co., 147 U. S. 177, 181, 182, 183, 13 S. Ct. 275, 37 L. Ed. 128, compare dissent 147 U. S. 188, 13 S. Ct. 279; Commonwealth *v.* Whipple, 181 Mass. 343, 63 N. E. 919; Pingrey *v.* National Life Insurance Co., 144 Mass. 374, 382, 11 N. E. 562.'

"Also, in Ballard *v.* Helburn, 9 Fed. Supp. 812, affd. 85 F. (2d) 613, it was said:

"'* * * The policies now under discussion did not expressly nor by implication reserve to the insured the right to claim the loan or surrender values without the consent of the beneficiary, and by the overwhelming weight of the authorities he could not surrender these policies for the cash surrender value, or secure a loan on them without the consent of the beneficiary. No control of his over the proceeds and benefits of the policies was terminated by his death. His control had already been terminated by his voluntary act in irrevocably assigning two of them, and by irrevocably designating Mrs. Ballard as beneficiary in the others. Nor can it be said that any interest in the proceeds passed at his death from the insured to the beneficiary. *Her interest in the proceeds had already vested by virtue of the assignment of two of the policies and by virtue of designation as beneficiary in the others.* * * *.'

"The agreement in the policy contract was that the loans on the policy would be made by the issuing company 'in conformity with its rules then in force'. An official of the issuing company testified in this proceeding that as to the policy under consideration the consent of the beneficiary would have been required either to change the beneficiary, to obtain a loan thereon, or to surrender the policy for its cash value. In Thomas C. Boswell et al., Executors, supra, we said that 'absence of the power to change beneficiaries in itself deprives an insured of authority in his own right to obtain the surrender value', citing Levy's Estate v. Commissioner, 65 Fed. (2d) 412, and Walker *v.* United States, 83 Fed. (2d) 103." (Italics ours.)

It might seem at first blush that the fact that the decedent retained the right to demand payment of the annuities during his life would take the present case out of the rule expressed in the foregoing cases. But such is not the case. In the *Blacksher* case, the Board held:

"The Union Central Life Insurance Co. policies Nos. 328,782 and 328,783 contain substantially the same features as those of the Mutual Life Insurance Co. of New York described above, with the additional provision that the insured should have the benefit of annual dividends. *This right to dividends, however, ceased upon decedent's death and was not thereby transferred to any other person.* The retention of a life interest in the income from property transferred does not require the inclusion of the property in the transferror's estate for estate tax purposes. May *v.* Heiner, 281 U. S. 238; Tait *v.* Safe Deposit & Trust Co. of Baltimore, 74 Fed. (2d) 851; Dwight Whiting, 35 B. T. A. 100. *The right to receive the dividends was not such an interest or 'incidents of ownership' in the policies as the Court had reference to in Chase National Bank of City of New York v. United States, supra, and as is contemplated by Article 27 of Regulations 70, supra.*

"We are of the opinion that the proceeds of the above described policies, Nos. 1,176,103, 328,782, and 328,783, are not includable in decedent's gross estate." (Italics ours.)

Conclusion.

For these reasons, we respectfully suggest that the decision of the Board of Tax Appeals is correct, and that that of the Circuit Court of Appeals is erroneous and should be reversed upon an allowance of the writ of certiorari.

Respectfully submitted,

W. W. SPALDING,
Tower Building,
Washington, D. C.;
Counsel for Petitioner.

MASON, SPALDING & MCATEE,
Of Counsel.

INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statute involved	2
Statement	3
Argument	4
Conclusion	5

CITATIONS

Cases:

Clise v. *Commissioner*, 41 B. T. A. 820 — 5

Helvering v. *Bullard*, 303 U. S. 297 — 4

Helvering v. *LeGierse*, No. 237, 1940 Term, advance sheets, p. 5 — 4

Statute:

Revenue Act of 1926, c. 27, 44 Stat. 9, Sec. 302, as amended — 2, 4

401997—41

In the Supreme Court of the United States

OCTOBER TERM, 1941

No. 135

ESTATE OF A. M. WILDER, DECEASED, JOSEPHINE UTZ WILDER, EXECUTRIX OF THE ESTATE OF A. M. WILDER, DECEASED, PETITIONER

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The memorandum opinion of the United States Board of Tax Appeals (R. 14–15) is not reported. The opinion of the United States Circuit Court of Appeals (R. 51–54) is reported in 118 F. (2d) 281.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered March 20, 1941 (R. 55). The petition for a writ of certiorari was filed June 6, 1941. The

jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

The decedent purchased out of community property, annuity contracts payable to himself for life and thereafter to his wife for her life. May there be included in his gross estate one-half the value of the annuity contracts as of the date of his death?

STATUTE INVOLVED

Revenue Act of 1926, c. 27, 44 Stat. 9:

> SEC. 302. [As amended by H. J. Res. 529 of March 3, 1931, c. 454, 46 Stat. 1516, and as further amended by Sec. 803 (a) of the Revenue Act of 1932, c. 209, 47 Stat. 169, and Sec. 404 of the Revenue Act of 1934, c. 277, 48 Stat. 680.] The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated, except real property situated outside the United States—
>
> * * * * *
>
> (c) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, or of which he has at any time made a transfer, by trust or otherwise, under

which he has retained for his life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death (1) the possession or enjoyment of, or the right to the income from, the property, or (2) the right, either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income therefrom; except in case of a bona fide sale for an adequate and full consideration in money or money's worth. Any transfer of a material part of his property in the nature of a final disposition or distribution thereof, made by the decedent within two years prior to his death without such consideration, shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this title.

* * * * *

(U. S. C., Title 26, Sec. 411.)

STATEMENT

The facts as stipulated (R. 30–45) and as found by the Board of Tax Appeals (R. 14–15) may be summarized as follows:

The decedent, A. M. Wilder, died in 1937, a resident of Louisiana (R. 14). In 1934 and 1936 he had purchased out of community property annuity contracts at an aggregate cost of $117,830.98 (R. 14–15). The contracts provided in the aggregate for monthly payments of $500 to the decedent for life and thereafter to his widow for her life. The

contracts were irrevocable, having no cash surrender or loan values, and making no provision for change of beneficiary (R. 15).

The Commissioner of Internal Revenue determined the value of the contracts to be $104,356.24 at the date of decedent's death, and included one-half of that amount, $52,178.12, in his gross estate. The Board of Tax Appeals reversed the action of the Commissioner (R. 15), but its judgment was in turn reversed by the Circuit Court of Appeals (R. 51–55).

ARGUMENT

The court below correctly ruled that to the extent that decedent purchased annuity contracts out of his own funds to commence at his death, he had made a transfer intended to take effect in possession or enjoyment at or after his death within the meaning of Section 302 (c), *supra,* p. 2. Cf. *Helvering* v. *LeGierse,* No. 237, 1940 Term, advance sheets, p. 5. It properly characterized the plan as one for "transferring money-values at death without administration" (R. 53). Moreover, since the decedent had reserved a life interest to himself, the result is further supportable by the more specific provisions in Section 302 (c) dealing with transfers in which the transferor has reserved a life interest. Cf. *Helvering* v. *Bullard,* 303 U. S. 297.

Petitioner alleges no conflict with any decision of this Court or of any other circuit court of ap-

peals, but does correctly point out that a contrary decision of the Board of Tax Appeals (*Clise* v. *Commissioner,* 41 B. T. A. 820) is now pending on appeal in the Ninth Circuit. The *Clise* case was argued on April 1, 1941, but no decision has yet been rendered. If that case should be decided contrary to the decision herein then we would not oppose the granting of the writ. However, if the *Clise* case should be reversed, there would be no basis for certiorari, since the decision herein is correct, and the question does not appear to be of such general importance to warrant further review in the absence of a conflict.

CONCLUSION

Unless a decision should meanwhile be rendered in the *Clise* case in conflict with the decision herein, the petition should be denied.

Respectfully submitted.

CHARLES FAHY,
Acting Solicitor General.
SAMUEL O. CLARK, JR.,
Assistant Attorney General.
SEWALL KEY,
ARNOLD RAUM,
JOSEPH M. JONES,
Special Assistants to the Attorney General.

JULY 1941.

U. S. GOVERNMENT PRINTING OFFICE: 1941